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Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

ADAM JADERANY,

Petitioner,
versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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69 pp

QUESTION PRESENTED FOR REVIEW

I. WHETHER, UNDER UNITED STATES V. KOON, 518 U.S. 81 (1996), THE SEVENTH CIRCUIT FAILED TO DEFER TO THE DISTRICT COURT'S DETERMINATION THAT UNDER THE GUIDELINES, JADERANY WAS ENTITLED TO A DOWNWARD DEPARTURE?

PARTIES TO THE PROCEEDING BELOW

The caption of the case contains the names of all the parties to the proceeding below.

CORPORATE DISCLOSURE STATEMENT

Supreme Court Rule 29.6 is inapplicable because Petitioner Adam Jaderany is an individual.

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The opinion of the United States Court of Appeals for the Seventh Circuit appears in the Appendix to this Petition for a Writ of Certiorari. (App. 35a). Its official citation is United States v. Jaderany, 221 F. 3d 989 (7th Cir. 2000). The district court's Memorandum of Decision and Order of April 30, 1999 also appears in the Appendix to this Petition (App. 29a), as does the district court's Memorandum of Decision and Order of March 23, 1999 (App. 1a). The district court orders have not been published.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered a judgment affirming Jaderany's conviction and sentence on July 21, 2000. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the judgment of the Seventh Circuit on a writ of certiorari.

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 3553(b) provides in relevant part that:

> The court shall impose a sentence of the kind, and within the range, referred to in [the sentencing guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.

U.S.S.G. § 5H1.5 provides in relevant part that:

"Employment record is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."

U.S.S.G. § 5H1.6 provides in relevant part that:

"Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."

U.S.S.G. § 5K2.0 provides in relevant part that:

> Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis. . . . [A]n offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines."

STATEMENT OF THE CASE

On January 22, 1997 Jaderany was indicted on twenty-one felony counts. The indictment alleged that Jaderany had participated in a conspiracy to roll back the odometers of used cars, had provided false mileage certificates related to used cars, had participated in mail fraud, and had transported certain falsified title documents in interstate commerce. After a trial, the jury convicted Jaderany on six counts of transporting falsely made, forged, altered, or counterfeited securities in interstate commerce, in violation of 18 U.S.C. § 2314. The jury acquitted Jaderany on all remaining counts of the indictment.

At sentencing, Jaderany requested a downward departure based on, among other things, family circumstances and community and employment status. The district court denied Jaderany's request. The court then sentenced Jaderany to thirty-three months imprisonment –

the low end of the guidelines range – plus three years of supervised release. It also granted Jaderany's request to remain free pending the resolution of his appeal.

Along with several other issues, Jaderany appealed the denial of his request for a downward departure to the United States Court of Appeals for the Seventh Circuit. On July 21, 2000, the Seventh Circuit denied all of Jaderany's claims and affirmed his conviction and sentence.

BASIS FOR JURISDICTION IN THE DISTRICT COURT

The district court had jurisdiction over this matter pursuant to 18 U.S.C. 3231.

ARGUMENT

I. Introduction

In Koon v. United States, 518 U.S. 81 (1996), this Court outlined the analytical framework for reviewing a district court's departure from the sentencing ranges in the United States Sentencing Guidelines (hereinafter "the guidelines"). The central message of Koon was that district courts have an institutional advantage over appellate courts in determining whether a case is exceptional enough to warrant a downward departure, i.e., whether a case falls inside or outside the "heartland." Because of this advantage, a district court's decision to depart from the guidelines deserves substantial deference. Since Koon, some circuits have properly allowed the district courts to determine the boundaries of the heartland in this fashion. Others, however, including the Seventh Circuit, have usurped this role. It is now time for this Court to clarify the confusion

surrounding which court is responsible for determining the boundaries of the heartland.

II. The circuit courts have interpreted Koon's mandate of deference in fundamentally different ways

A. The Koon decision

The Court in Koon granted certiorari to resolve "the standard of review governing appeals from a district court's decision to depart" from the guidelines. Koon, 518 U.S. at 91. Before delving into the standard of review, however, the Court outlined how district courts should approach requests for departures. First, the district court must determine whether the proposed bases for departure are forbidden, discouraged, encouraged, or unmentioned by the guidelines. See id. at 95. If the bases are forbidden, the district court may not rely on them. If they are encouraged, the court is free to depart as long as the applicable guideline does not already take them into account. See id. at 96. If they are discouraged, the court should depart "only if [they are] present to an exceptional degree." Id. If they are unmentioned, the court must decide whether, in light of the relevant individual guidelines and the guidelines scheme as a whole, they are sufficient to take the case out of the guidelines' heartland. Id. Departures based on discouraged and unmentioned factors have generated the bulk of the case law in the circuit courts.

Koon held that the circuit courts should review district court departures for an abuse of discretion. See id. at 99. In support of this holding, Koon found that "Congress did not intend . . . to vest in appellate courts wide-ranging authority over district court sentencing decisions." Id. at 97. It also noted that district courts have an institutional advantage over appellate courts in determining "whether a

discouraged factor justifies departure because it is present in some unusual or exceptional way." Id. at 99. One reason for this advantage is that district courts see far more guidelines cases than do appellate courts.[1] As a result, they have invaluable and extensive "day-to-day experience in criminal sentencing." Id. To ignore this "special competence . . . would risk depriving the Sentencing Commission of an important source of information, namely, the reaction of the trial judge to the fact-specific circumstances of the case." Id. (omitting citations and internal quotation marks).

Of course, Koon did not require appellate courts to defer to erroneous conclusions of law. See id. at 100. For example, *de novo* review is appropriate to determine "whether a factor is a permissible basis for departure under any circumstances" or whether the district court "made some sort of mathematical error in applying the [g]uidelines." Id. at 99-100. The determination of whether particular conduct falls within the heartland, by contrast, involves a "factual . . . inquiry." By its very nature, this inquiry requires the district court to define the boundaries of the heartland. Again, the district courts have special competence in this regard due to their substantial experience with guidelines cases. See id. at 99.

B. The interpretations of Koon

The circuit courts have applied Koon in significantly different ways. Cf. United States v. Archuleta, 128 F.3d 1446, 1449 n.6 (10th Cir.1997) ("The Circuit Courts after Koon have drawn the line [between de novo review and deference] in different places."); see also IAN WEINSTEIN, THE DISCONTINUOUS TRADITION OF SENTENCING DISCRETION: KOON'S FAILURE TO RECOGNIZE THE RESHAPING OF JUDICIAL

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[1] In 1994, for instance, 93.9% of guidelines cases were not appealed. See Koon, 518 U.S. at 99 (omitting citation).

DISCRETION UNDER THE GUIDELINES, 79 B.U.L. REV. 493, 527 ("The deference actually shown to district courts under the abuse of discretion standard depends on the reviewing [circuit]."). The disparities are perhaps most striking in cases involving departures for family and employment circumstances. Cf. Archuleta, 128 F.3d at 1452 n.9 and n. 10 (collecting cases). The courts that scrutinize and reject such departures interpret Koon as charging them with defining the boundaries of the heartland. See, e.g., United States v. Iaderany, 221 F.3d 989, 995 (7th Cir. 2000)("[T]he inquiry into the boundary of the heartland has a legal dimension that it is our responsibility to address."). By contrast, the courts that defer to and affirm such departures emphasize the district courts' role in the boundary-setting analysis. See, e.g., United States v. Mendoza, 121 F.3d 510, 515 (9th Cir. 1997)("What falls inside the 'heartland' of a Guideline is . . . within the discretion and special expertise of the district court in the first instance.").

The Seventh Circuit's analysis typifies the non-deferential approach to departures, and particularly family and employment circumstances departures. See Iaderany, supra; United States v. Wright, 218 F.3d 812 (7th Cir. 2000); United States v. Stefonek, 179 F.3d 1030 (7th Cir. 1999); United States v. Guy, 174 F.3d 859 (7th Cir. 1998); United States v. Carter, 122 F.3d 469 (7th Cir. 1997)(all reversing downward departures for family circumstances).[2] According to Iaderany, the message of these cases is that, as a matter of law, defendants' "responsibilities to their children . . . , standing alone, cannot be considered extraordinary." See Iaderany, 221 F.3d at 996 (omitting

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[2] United States v. Owens, 145 F.3d 923, 928 (7th Cir. 1998) is the only post-Koon Seventh Circuit case to affirm a downward departure based on family and employment circumstances. The substantial deference accorded the district court in Owens cannot be squared with other circuit precedent. This was evident in Iaderany, which cited but pointedly omitted discussion of Owens.

citations). Likewise, "holding a steady job is not extraordinary, but in fact expected." See id.; see also Stefonek, 179 F.3d at 1038 ("[c]riminals who have the education and training that enables people to make a decent living without resorting to crime are more rather than less culpable than their desperately poor and deprived brethren in crime."). As discussed below, *ex ante* legal conclusions of this sort go a long way toward defining the heartland. As a result, the district courts are deprived of most, if not all, of their discretion.

Probing review is not unique to the Seventh Circuit, nor to family circumstances departures. The Fourth Circuit, for instance, has closely scrutinized all departures. See, e.g., United States v. Withers, 100 F.3d 1142 (4th Cir. 1996)(rejecting district court's finding of and departure for diminished capacity because defendant merely suffered from "emotional problems"). Family circumstances departures, however, have faced particular hostility. See United States v. Rybicki, 96 F.3d 754 (4th Cir. 1996)(concluding, without analysis, that the record did not indicate that the defendant's family circumstances were exceptional); see also United States v. Wilson, 114 F.3d 429 (4th Cir. 1997)(reversing family circumstances departure because court "has held improper departures based on [circumstances] . . . much more compelling than [the defendant's]"). One court has gone so far as to suggest that the Fourth Circuit's departure review approaches *de novo* scrutiny. See Archuleta, 128 F.3d at 1449 n.6.

The Second Circuit typifies the deferential approach to departures, and particularly family circumstances departures. See WEINSTEIN, 79 B.U.L. REV. at 528 ("[The Second Circuit] has shown great deference to the district judge's finding that a given factor is exceptional and falls outside the heartland."); see also United States v. Galante, 111 F.3d 1029 (2nd Cir. 1997) and United States v. Rioux, 97 F.3d 648 (2nd Cir. 1996)(both deferring to family

circumstances departures). The Second Circuit's approach is based on an acknowledgment and even embrace of the subjectivity of the departure inquiry. See Galante, 111 F.3d at 1034. Galante described the test as "whether the circumstances relied upon to justify a downward departure are so far removed from those found exceptional in existing case law that the sentencing court may be said to be acting outside permissible limits." Id. at 1036. Under this approach, the circuit courts do not proactively prescribe the boundaries of a particular heartland. Instead, they let the district courts make this determination and merely act as a check against wildly impermissible departures.

C. A clarification of Koon is necessary

Each of the circuit courts has acknowledged that under Koon, they owe substantial deference to district court departure decisions. In practice, however, the level of deference has varied a great deal. See Archuleta, 128 F.3d at 1149 n.6. This is especially true for departures related to family and employment circumstances. See id. The Seventh Circuit, among others, has declared that the definition of the heartland is a legal question that merits *de novo* review. See Jaderany, 221 F.3d at 995. Whether specific conduct falls inside or outside the heartland, on the other hand, is a factual question. See id. The Second Circuit has adopted a simpler approach. It has stated that a departure will stand unless it is "outside permissible limits." See Galante, 111 F.3d at 1034. In addition to these subtle inter-circuit disparities, some intra-circuit splits have also resulted. Compare Stefonek, supra, with Owens (conflicting approaches in the Seventh Circuit), supra.[3] Because of these

[3] The existence of contradictory decisions by panels of the same Court is difficult to explain in the context of true deference.

inconsistencies, Supreme Court review is necessary to clarify the proper approach.

The confusion generated by the varying interpretations of Koon was evident in the district court's assessment of this matter. The district court believed that *under the guidelines*, Jaderany's family and employment circumstances were "of a kind, or to a degree, not adequately taken into consideration by the [commission]." Memorandum of Decision and Order of April 30, 1999, p.5. In other words, based on the particular guideline at issue, the guidelines as a whole, and the district court's experience in sentencing, a departure was warranted. See Koon, 518 U.S. at 96-98. At the same time, the district court believed that under the Seventh Circuit's broad pronouncements regarding the scope of the heartland, it had no discretion to depart. As a result, like many other district courts throughout the country, the Jaderany court openly questioned the scope of its discretion and requested guidance on appeal. Under a proper interpretation of Koon, the district court would have recognized its ability to grant a departure.

The primary problem with the Seventh Circuit's approach is that the process of defining the heartland can never be wholly separated from the process of determining whether a defendant's conduct falls inside or outside of it. After all, the heartland can be defined only by referencing a typical defendant's conduct. Despite the inevitable collapse of these inquiries, Jaderany and other Seventh Circuit precedent insist that the definition of the heartland involves purely legal analysis, while the contextualizing of the offense circumstances involves factual determination. See Jaderany, 221 F.3d at 996. This false dichotomy allows the circuit court to intrude on a district court factual findings under the guise of reviewing legal issues *de novo*.

An alternative way to frame the issue is that the Second Circuit contemplates a reactive assessment of

individual departures, while the Seventh Circuit contemplates proactive guidance on departures as a whole. Regardless of how the issue is packaged, however, the better approach is that of the Second Circuit. By emphasizing that departures will stand unless they are "outside permissible limits," see Galante, 111 F.3d at 1034, the Second Circuit places deference and flexibility at the forefront of the analysis. The Seventh Circuit, by contrast, focuses on binding rules of decision and uniformity. Deference, of course, is the touchstone of Koon. Moreover, the Second Circuit's standard of review is unitary, not two-tiered, see Koon, 518 U.S. at 100, and therefore less susceptible to a collapsing of roles as in the Seventh Circuit scheme.

A significant problem with the proactive approach is that it tends to sweep together the subtle distinctions between the ordinary and the extraordinary case. The reasoning is as follows. Appellate courts glean their facts from a cold record. Thus, distinctions involving credibility and emotion are eliminated from the outset. Of the remaining facts in the record, only the most pertinent ultimately appear in an appellate decision. Those that survive are typically summarized for the sake of expediency. Inevitably, small distinctions are either winnowed out or ignored in the ultimate product. Boiled down to their barest form, each defendant's circumstances start to sound a great deal alike. Thus, the precedential rule of decision that emerges fails to account for the meaningful distinctions that may appear at the district court level.

This cycle is especially potent for departures involving family and employment circumstances. Although "family circumstances" is a fairly nebulous term, it must be defined in large part by responsibilities to children. By announcing that such responsibilities are uniformly insufficient, standing alone, to justify a departure, see Iaderany, 221 F.3d at 996, the Seventh Circuit arguably precludes any defendants from qualifying for a family

circumstances departure. The fact is that children in ostensibly similar circumstances can be affected by a parent's sentence in vastly different ways. See United States v. Gauvin, 173 F.3d 798, 807 (10th Cir. 1999)(in analysis of family circumstances departure, court suggests, per Tolstoy, that all happy families are alike, but each unhappy family is unhappy in its own way). This is precisely the type of information that the district court should be allowed to ferret out through credibility determinations regarding live testimony. See Koon, 518 U.S. at 98. Under the proactive approach, the broad pronouncements of the appellate court dominate the inquiry.

The same holds true for defendants seeking an employment circumstances departure. This basis for departure was obviously intended to account for those defendants whose work is exceptionally important to their families or society. In suggesting that such defendants are more culpable than their unemployed counterparts (and decrying employment circumstances departures as "middle class sentencing discounts" See Stefonek, 179 F.3d at 1038), the Seventh Circuit has all but foreclosed this basis for departure. See Carter, 122 F.3d at 475 (approving of district court's conclusion that "strikingly meritorious" employment was insufficient to trigger departure for employment circumstances). Surely Congress did not intend that departures for employment circumstances be interpreted in this fashion.

Another problem with the Seventh Circuit's approach is that it raises questions about how the district courts should treat pre-*Koon* definitions of the heartland. In most cases, these definitions were formulated by appellate courts on *de novo* review of a district court departure. Typically, appellate courts that have adopted the Seventh Circuit's proactive approach to departure jurisprudence include pre-Koon decisions in the universe of controlling law. As a result, the "substantial deference" accorded to

district court departures is illusory. Instead of defining the precise contours of the heartland based on the guideline at issue, the guidelines as a whole, and the experience with other guidelines cases, see Koon, 518 U.S. at 96-98, district courts are forced to follow the past pronouncements of the appellate courts. Often these pronouncements were the result of a probing *de novo* review. Such an approach Adeprive[s] the sentencing commission of an important source of information, namely the reactions of a trial judge to the fact-specific circumstances@ of emerging cases. See id. at 100.

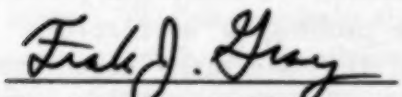
Absent a clear circumvention of the guidelines, the district courts should decide what makes a case exceptional. In other words, they should be charged with defining the contours of the heartland. See id. Appellate review should involve not broad pronouncements intended to constrain discretion, but rather a deferential, case-by-case assessment of whether the district court acted "outside permissible limits." See Galante, 111 F.3d at 1034. To the extent that some inconsistency results from this approach, it is an inevitable and appropriate byproduct of vesting the district court with discretion.

III. Conclusion

Koon and its progeny affect district court sentencing decisions on a daily basis. For the reasons discussed above, a clarification of the appropriate standard of review under Koon is appropriate.

Respectfully submitted,

BECKMAN LAWSON, LLP

By: 

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

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U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
v.	)	Cause No. 1:97-CR-6
	)	
ADAM JADERANY,	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER

This matter is before the Court subsequent to a sentencing hearing on August 20, 1998 at the conclusion of which this Court ordered briefing in regard to a number of sentencing issues which had been raised. The government filed its Sentencing Memorandum on September 21, 1998. On October 19, 1998, defendant filed a response to that memorandum along with a Motion for Downward Departure. The government filed it reply to defendant's sentencing and response to defendant's motion for departure on November 3, 1998. On February 8, 1999, defendant filed an "Addendum to Motion for a Downward Departure Pursuant to § 5K2.0, *et al.*, of the Sentencing Guidelines and 18 U.S.C. § 3553(E)." The Court hereby enters this Memorandum of Decision and Order addressing all of those filings.

Discussion

On January 22, 1997, the grand jury returned a twenty-one count indictment against the defendant. Count I generally charged defendant with conspiracy relating to eleven motor vehicles whose odometers had been rolled-back. It alleged that defendant (and others) had forwarded false statements via the mails and transported (or caused to be transported) in interstate commerce falsely made, forged, altered and counterfeit securities (certificates of titles and other ownership documents) with the object being that mostly late-model, high-mileage vehicles would be purchased, the odometers rolled-back, the supporting documents altered to reflect that change, and the vehicle resold with the representation that the new false low-mileage readings represented the true mileage of the vehicles. Counts 2 through 10 asserted that defendant certified and caused to be certified as accurate false mileage on nine different vehicles. In counts 11 through 15, defendant was charged with mail fraud for causing the mails to be utilized with respect to five vehicles whose odometers had been rolled-back. Counts 16-21 charged that the defendant transported or caused to be transported in interstate conmmerce falsely made, forged, altered and counterfeited securities-namely, certificates of title, reassignment of title, and other title and ownership documents relating to six of the vehicles.

After a trial lasting several days, defendant was acquitted by a jury on the first fifteen counts of the indictment. He was, however, convicted on counts 16 through 21 relating to the transportation of false securities. The probation department then prepared its presentence report.

In his preparation of the presentence report, United States Parole and Pretrial Services Officer Edington calculated that there were somewhere between 90 and 100

vehicles[1]/ involved in the rollback scheme which should be attributable to the defendant and that the average amount of loss per vehicle was $4,000.00. Officer Edington calculated the estimated loss at $400,000 which upped by nine levels the base offense level of six for fraud. To this number was added two points for more than minimal planning and an additional three points as an adjustment for the role in the offense since defendant was said to have directed at least five others in acquiring fraudulent vehicle titles. Totaled, defendant's adjusted offense level was pegged at 20 and, with a criminal history category of I, he fixed a guideline range for imprisonment of between 33 and 41 months.

Objections were lodged by both sides. In fact, the parties could hardly take a more varying view of the evidence. The government is of the opinion that defendant should be held responsible for a total loss of $800,000 which represents some 200 vehicles at $4,000 per vehicle. Under defendant's view, the amount of loss would total less than $18,000 for the six offenses of conviction.[2]/

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[1] / This figure represents 79 to 91 vehicles based on exhibits the government had supplied along with several vehicles added as a result of a statement given by Laura Simkiewicz to the government.

[2] / As an alternative, (and due to the uncertainty of loss calculations), defendant argues that he should only receive a 1-2 level increase in the base offense level. Defendant testified that he obtained approximately 50 to 60 speed-titles and earned $25-35 for each vehicle processed. He also earned commissions of between $350 and $400 per vehicle. His total gain, based on this scenario, would be between $17,500 and $24,000.

This Court rejects the net gain theory as the appropriate way to calculate loss in this case. "Generally, the defendant's gain may provide a reasonable approximation of a victim's loss, and may be used when more precise means of measuring loss are unavailable." *United States v. Andersen*, 45 F.3d 217, 221 (7th Cir. 1995). As the Seventh Circuit pointed out in Andersen, however, that case "present[ed] an unusual situation where the relationship between

The task presently before the Court is to determine the amount of loss in this case. Additionally, the Court must determine whether the offense level should be increased for obstruction of justice. Finally this Court must consider whether a downward departure is warranted. Resolution of those issues addreses the objections raised by both the government and the defendant to the presentence report. The Court will consider those issues in turn.

A. Amount of loss

Under the Guideline section governing "Offenses Involving Fraud or Deceit" the base offense level is 6.[3]/ A court is then required to determine the amount of loss associated with the fraud and to adjust the offense level in accordance with the provided chart.

The government must establish the amount of loss by a preponderance of the evidence. *United States v. Loscalzo*, 18F.3d 374, 386 (7th Cir. 1994). 'The Application Notes to the Guidelines loss section specify that 'the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available

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the defendant's gain and any loss suffered by consumers or competitors [wa]s, at best tenuous" and that "[w]hile gain may normally prove an adequate surrogate for loss, gain may be used only as an alternative method of calculation when there is in fact a loss, and only if use of the gain results in a 'reasonable estimate of the loss.'" Id. (quoting U.S.S.G. § 2FI. 1, comment. (n. 8). Here, there is evidence to support a loss calculation which is not "at best tenuous" and, moreover, a loss calculation based upon defendant's self-serving statements about a purported net gain would not, in this court's view be "a reasonable estimate of the loss."

[3] / Sentencing guideline 2N3.1 relates to "Odometer Laws and Regulations" and specifically cross-references to section 2F1. 1 "[i]f the offense involved more than one vehicle."

information.' U.S.S.G. § 2Fl.l comment n. 8." *United States v. Austin*, 54 F.3d 394, 402 (7th Cir. 1995).[4]/

A two step process must be used to determine the amount of loss in this case. The number of vehicles must be determined to which an amount of loss per vehicle must be assigned.

1. **Number of Vehicles**

As indicated, there is a wide discrepancy between the parties (and the probation officer for that matter) as to the amount of vehicles which should go into the loss calculation. The defendant says six (representing the counts of convictions, the government says two hundred, and the probation officer (in his report) says the number should be somewhere close to one-hundred.

This Court must reject defendant's suggestion that only six vehicles should be included in determining the amount of loss. In an effort to limit his exposure to the amount of vehicle in the counts of conviction, defendant argues:

> The Government's position postulates that when the "Chicago dealers running an odometer tampering scheme learned they risked discovery by law enforcement, they "began to try to obtain vehicle titles in Indiana through Adam Jaderany." The Government presented several witness [sic] at trial in its attempt to link Jaderany to the odometer conspiracy masterminded by big-time

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[4] / "'Loss' as that term is used in the Guidelines has been defined as the greater of the value of the property 'taken, damaged, or destroyed,' i.e., the actual loss (cross reference to § 2BI. 1), or the property the defendant intended to take.' *United States v. Johnson*, 16 F.3d 166, 169 (7th Cir. 1994)(quoting U.S.S.G. § 2FI. 1).

> "Chicago dealers," such as Joseph Sosani, an admitted felon. However, the jury did not find Sosani or any of the Government's witnesses on key issues to be credible. While the Government failed to provide sufficient evidence of Jaderany's involvement for his trial, it wants this Court to favorably consider that failure for sentencing purposes.

(Def. Sent. Br. pp. 4-5). Defendant then goes on to portray himself as "merely a salesman, unwittingly working for them [the Chicago dealers]" and that "[w]hen he became suspicious the conduct of the 'Chicago dealers' he terminated his contact with them." (Id. p. 5).

The underlying premise of defendant's argument that only the six counts of conviction should enter into the loss calculation rests upon two interrelated faulty premises-that the jury did not believe the government's witnesses and that the government's failure to convince a jury beyond a reasonable doubt precludes consideration of the other counts for purposes of sentencing.

With respect to the suggestion that the jury did not believe the government's evidence, this Court cannot agree that that conclusion necessarily follows. As was pointed out in this Court's Memorandum of Decision and Order denying defendant's motion for judgment of acquittal:

> Merely because defendant was acquitted on the majority of counts with which he was charged does not perforce make the jury's conclusion with respect to the remaining counts inconsistent. As the government points out, an acquittal does not mean that the defendant did not commit the acts charged. The most that could be said by that determination is that the jury was not convinced that the government proved each and every one of the elements with respect to

> those charges. Or it could be that the jury could have found that the defendant was engaged in a conspiracy and scheme to defraud but that the evidence did not show the conspiracy or scheme conformed to what was charged in the indictment. Or it could be that the alleged inconsistent verdicts were a product of jury lenity for "it is not unusual for a jury to convict on one charge, and acquit on another, if they want to give the defendant a break for whatever reason, or they... feel that the punishment for one crime is appropriately severe for both offenses." *UnitedStates v. Nobles*, 69 F.3d 172, 189 (7th Cir. 1995).

(Rec. 46, p. 18). As was also pointed out in this Court's prior decision, the evidence of defendant's participation in the fraud was not limited to the counts of conviction for the evidence at trial suggested among other things that defendant discussed what mileage should be placed on various vehicles, the altering of odometer statements and discussions relating thereto, and requests that odometers be rolled back.[5]/

Instead of limiting the amount of vehicles to those for which he was convicted, this Court must also look at relevant conduct. The sentencing guidelines provide that the offense level is determined on the basis of all acts commited, aided, or abetted by the defendant, and, where there is jointly undertaken criminal activity, by all reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal activity, or all the harm that

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[5] /Moreover, it is to be noted that the same six cars which served as the basis for his counts of conviction were also mentioned in other counts for which defendant was acquitted.

results from or was the object of such acts. U.S.S.G. § IB1.3.[6] / Thus the number of vehicles to be included is far more than the six suggested by the defendant.

The number to be included, however, is not some two hundred vehicles as the government suggests. That number, as the probation officer pointed out, may well in fact involve double-counting and it is very far from clear, as the government asserts, that the figure is "conservative." In fact during the course of the sentencing hearing, the government, while arguing that it believed the number was actually higher, conceded that the basis for the probation officer's position with respect to the actual number of vehicles was probably stronger. Given the lack of concrete evidence to support its figures and further given that "'[t]he fraud guideline ...has never endorsed sentencing based on the worst-case scenario potential loss,"' *United States v. Holisa*, 13 F.3d 1043, 1046 (7th Cir. 1994)(quoting, *United States v. Kopp*, 951 F.2d 521, 529 (3d Cir. 1991), this Court does not consider the government's 200 vehicle figure to be an adequate basis upon which to calculate the amount of loss.

What does appear to be closer to the facts is the loss calculation made by the probation officer.[7]/ Here, the

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[6] / If the offense is one which requires grouping of multiple counts under USSG §3D 1.2(d), the defendant is responsible for all acts of others that were part of the same common scheme or plan or the same course of conduct as the offense of conviction. However, responsibility is only for conduct which is within the scope of defendant's agreement. See, USSG § IBI.3(a)(2) and comment note 3.

[7] / "Rule 32(b)(6)(D) of the Federal Rules of Criminal Procedure expressly permits a district court to accept a PSR (Presentence Report) as its findings of fact." *United States v. Wing*, 135 F.3d 467, 469 (7th Cir. 1998) although the district court is not bound by the recommendation and is charged with the responsibility to 'resolve disputed sentencing factors in accordance with Rule 32(a)(1)."'

probation officer came up with a figure of 79 to 91 vehicles. That figure was based upon documentary evidence in the form of statements from Frank Loftus, Christine White, Carolyn Meek and Loraine Camp. He then upped that figure to 90-100 based upon the government's position statement that many more vehicles were involved and a statement by Simkiewicz.

Defendant has taken the position that if this Court finds that more than the offenses of convictions should be included in the calculation and finds the presentence report to be an accurate reflection of the number of vehicles, that number should still be reduced. His argument is two-fold. First, the number should not have been upped to around 100 vehicles based on the unadorned statements of the governmemt and the statement by Simkiewicz. Second, because the trial testimony of Meek was different than that in her statement and the probation officer testified that he would credit testimony given in court over a statement, the 79-91 numbers should be reduced to between 39-61 vehicles.

Contrary to defendant's assertion, there is evidence before the Court which supports titling by Simkiewicz at the behest of the defendant. According to Robert Eppes, a Special Agent employed with the Odometer Fraud Staff of the National Highway Traffic Safety Administration, defendant, during an interview, indicated that Simkiewicz applied for titles 10 times. Hence, 10 vehicles could rightfully be added to the 79-91 figure.

The issue logically becomes then whether the 79-91 figure is a correct number for the amount of vehicles. Defendant is of the view that that number should be reduced because it includes too many vehicles attributable to Meek. This Court agrees.

United States v. Schuler, 34 F.3d 437, 461 (7th Cir. 1994)(quoting, USSG § 6A1.3).

As indicated, the probation officer made his calculation based upon documentary evidence supplied by the government. That documentary evidence suggests that Loftus titled 15-19 vehicles, White titled 6, Meek titled 50-60 and Camp titled 3 for the defendant. The probation officer then threw in a couple of more vehicles (apparently for the amount titled by Simkiewicz) and arrived at the 79-91 figure.

Defendant argues that range is too high because of the amount tallied as a result of Meek's participation and that instead the range should be between 39 and 61. This is so because during the trial Meek did not testify to any figure even nearing the 50-60 mark. Instead, in response to the question "About how many vehicles did you title in this fashion?" she testified "Twenty or more, I'm not sure." Upon being informed of this difference between the statement and the trial testimony, the probation officer indicated that if he had known about the trial testimony he would have credited that testimony.

This Court is of the view that only 20 vehicles should be added to the calculation as a result of Meek's participation. That is the figure she testified to during the trial. While it is true that she had earlier indicated in a statement and before the grand jury[8]/ that she had titled 50-60 titles for defendant, no such testimony was forthcoming in the trial. While it may also be true as the government points out that memories fade over time, this Court refuses to believe that they would fade to that extent. More importantly, this Court does not believe it proper for the government to attempt to significantly up the ante with regard to defendant's sentence by utilizing a statement given

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[8] /Actually her reiteration of the 50-60 figures in front of the grand jury was nothing more than here acknowledging that she had given those figures in a statement (i.e. Q: And, also, according to this statement, at certain times you titled approximately 50 to 60 vehicles for him, is that correct? A: Yes:).

prior to trial when there was testimony at trial which covered the same event. Undoubtedly if Meek had testified at trial about 50-60 vehicles but in an earlier statement represented that there were "20 or more" vehicles, no effort would have been made by the government to have this Court believe that the proper figure should be around 20 vehicles.

Based upon the preponderance of the evidence, this Court finds that the number of vehicles attributable to the defendant is 44-48. That number is based upon the 15-19 vehicles indicated by Loftus, 20 vehicles attributed to Meek, 6 to White and 3 to Camp. While that figure could be increased by 10 based upon vehicles titled by Simkiewicz, the Court believes that the 44-48 figure is the best "reasonable estimate of the loss, given the available information." U.S.S.G. § 2FI.1 comment n. 8. [9]

B. Loss per Vehicle

The probation officer calculated the amount of loss attributable to each vehicle to be $4,000. Defendant asserts that this figure is too high and that it improperly includes consequential and incidental damages. Instead, defendant asserts that the number should be less than $3,000 per car in accordance with an affidavit he supplied from Joseph L. Barrett. This Court finds that while there is support for a $4,000 figure, the better figure is $3,000.

The $4,000 figure was supplied by the government and is supported by the declaration of Special Agent Eppes, a study by the Pennsylvania Office of the Attorney General, a study of maintenance costs, and reports by some of the victims in this case. In this Court's view, there are several problems with that figure.

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[9] / The Court notes that during the sentencing hearing, the government indicated that it was withdrawing any claim that Simkiewicz was a criminal actor in the sale of these vehicles.

First, Eppes' report can be read as including consequential and incidental damages such as finance charges, insurance costs, repair costs, taxes, and the buyer's lost time associated with breakdown and repairs and it is not altogether clear that such damages should go into the loss calculation.[10] / Second, the Pennsylvania report is dated (circa 1985) and involved a study of leased vehicles. While the government argues that defendant "fails to provide

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[10] /Arguably, Eppes' report can be read as not necessarily including consequential or indidential damages. Paragraphs 6-8 of Eppes' statement indicates that he attempted to estimate the loss per vehicle that consumers would suffer if they attempted to resell their vehicles and that amount is generally forty to fifty percent of the purchase price of the car. Since the average purchase price per vehicle in this case was $9,800, the average loss would be between $3,920 and $4,900. Such calculations do not on their face appear to include consequential or incidental damages.

Further, it is not clear that in a case such as this that the Court could not look at consequential and incidental damages in determining the amount of loss. In an effort to show that the Court should not, defendant cites *United States v. Marlatti*, 24 F.3d 1005 (7th Cir. 1994), a decision in which the Seventh Circuit indicated that the "judge is not permitted ... to add consequential or incidental damages to the loss in determining which guideline is applicable." But *Marlatt* was a case involving the fraudulent procurement of insurance policies, a case in which the Seventh Circuit noted Application Note 7(b) precluded the inclusion of incidental or consequential damages. Application Note 7(c) allows for such damages in cases involving "product substitution" which has been defined as one "in which the product sold is something other than what it is claimed to be." *United States v. Chatterji*, 46 F.3d 1336, 1341 (4th Cir. 1995). Here, as the government points out, the vehicles involved were something other than what they were represented to be-low mileage rather than high mileage vehicles-and involved misrepresentation of the physical condition of the vehicle which could have a direct effect on performance.

There are, nevertheless, other factors which lead this Court to conclude that the $4,000 amount is not appropriate.

anything that would lead one to conclude that [his] victim would have a different experience than the consumers in the Pennsylvania study," there is little in the way to suggest why the experiences in this case would necessarily be the same. True, in response to questions, some of the victims have pegged their losses right at the $4,000 amount but it is difficult to tell how that figure was arrived at short of some sort of prodding.[11]/

In deciding that $3,000 is supported by the preponderance of the evidence, this Court credits the declaration of Joseph L. Barrett, a former used car manager for several commercial dealerships in Fort Wayne. In that declaration he avers the following:

> I have sold over 10,000 automobiles personally in the Fort Wayne, Indiana area and am familiar with the Fort Wayne used car market for the years 1987 to date.
>
> I have attended numerous sales seminars and programs on marketing and sales involving automobiles. I am familiar with books published in the car sales industry that provides guides to car values including those involving values connected to a car's mileage.
>
> I have reviewed the descriptions of cars included in the Indictment filed against Adam Jaderany.

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[11] / The Court notes that on November 20, 1998, the government submitted an unopposed exhibit from Shaw-Pin Miaou of Oak Ridge National Laboratory. That exhibit declares that the approximate average economic life of a car is 135,000. The exhibit does not appear to suggest any value which should be placed on vehicles with rolled-back odometers.

I have randomly reviewed the statement of interviews provided to Mr. Jaderany of approximately 47 additional cars that were claimed to have their odometers rolled back.

I have also randomly reviewed records at the United States Attorney's Office in Fort Wayne, Indiana of other cars that were claimed to have rolled back odometers that were sold through the Fort Wayne auction.

Based on my review of the car descriptions and assuming the cars were in a well-kept condition at their time of sale and potential for resale, I believe their losses in retail value on resale (assuming their odometers had been rolled back to the extent claimed on each car) will average less than $3,000.00 per car.

Cars sold in Fort Wayne, Indiana are generally in better condition externally than in other geographic areas. Also people who buy cars in the Fort Wayne, Indiana area take better care of their cars and thus are able to get more money when they are resold.

My opinion is based on my experience in sales of used vehicles including those that have been designated as "mileage unknown" due to odometer problems.

The re-sale value of a car depends on may variable factors including the person selling the car, the person to whom the car is being sold, the color of the car, the popularity of the car (such as Ford Tauruses), the time of the year, the price of the car and the financing available.

(Sentencing Hearing, Def. Ex. B).

The foregoing is directed at the relevant market and is given by one who has spent a considerable amount of time in the trade. While the Court is aware that there is some suggestion of an acquaintanceship between the affiant and the declarant there is no suggestion that the affidavit was based upon anything other than the affiant's knowledge and experience in the local used car market.[12] /

While this Court is of the view that the amount of loss per vehicle should be $3,000, some consideration must be given to the fact that defendant claims that he did work which improved the vehicles. In this vein he claims that he spent on average $300 per vehicle and that the work involved may have included such things as putting new tires on the car, giving it a tune up, painting scratches, fixing the radio or putting on new brakes.

While there is support for the proposition that such improvements may be considered in determining the amount of loss since "even a car with rolled back odometer ... may still have part of its value attributable to legitimate activities of the odometer tamperer," *United States v. Alborz*, 818 F. Supp. 1306, 1308-09 (N.D. Cal. 1993), no furher reduction appears to be appropriate in this case. Leaving aside the self-serving nature of defendant's contention, this Court arrived at the $3,000 figure by crediting the affidavit of Barrett. In the affidavit, Barrett arrives at his calculation on the assumption that the cars were in a well-kept position at their time of sale and potential resale and also on the fact that cars sold in Fort Wayne are generally better than those sold elsewhere and that people who buy vehicles in this

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[12] / The Court also notes, as the government points out, that this individual did not testify at the sentencing hearing and hence was not subjected to cross-examinaion. Come to think of it, however, neither was the government's witness Eppes.

town generally take better care of their cars than elsewhere. Defendant will not given extra mileage by an additional reduction for the amount of money he purportedly placed in the cars which he resold.

C. Summary of Amount of Loss

Based on the foregoing, the Court finds that the number of vehicles involved which should be attributed to the defendant to be 44-48 and that the average amount of loss per vehicle is $3,000. This results in an amount of loss of between $132,000 and $144,000. Since that figure is more than $120,000 but less than $200,000, 7 levels will be added to the base offense level of 6 under USSG § 2Fl. 1.

II. Enhancement for Obstruction of Justice

Section 3CI. I of the USSG provides that the offense level should be increased by two levels "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." The government argues that this enhancement is warranted given defendant's denials during his testimony while defendant asserts that it is not warranted since the enhancement only applies to offenses of conviction.

"[I]n order to receive an enhancement under § 3CI.1, a defendant must obstruct or attempt to obstruct justice 'in the instant offense'-the offense charged in the indictment for which the defendant was convicted." *United States v. Burke*, 125 F.3d 401, 403 (7th Cir. 1997). The government need only prove the obstruction of justice by a preponderance of the evidence to justify the enhancement. *United States v. Hickok*, 77 F.3d 992, 1006 (7th Cir. 1996).

No doubt, "[p]erjury can be the basis for such an enhancement." *United States v. Agostino*, 132 F.3d 1183, 1198 (7th Cir. 1997)(citing, USSG §3CI.1, comment (n.3(b)). "A defendant commits perjury for the purpose of this provision if he 'gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a

result of confusion, mistake, or faulty memory.'" Id (quoting *United States v. Dunnigan*, 507 U.S. 87, 94, 113 S.Ct. 1111, 1116 (1993)).

In the present matter, it is clear that defendant obstructed justice within the meaning of the guidelines during his testimony and that that testimony was material to the charges for which he was convicted. As indicated earlier, defendant was convicted with respect to counts 16-21 which charged that the defendant transported or caused to be transported in interstate commerce falsely made, forged, altered and counterfeited securities-namely, certificates of title, reassignment of title, and other title and ownership documents relating to six of the vehicles. In order to sustain its burden of proof with respect to those counts, the goverment was required, among other things, to show:

> First, the defendant transported the securities in interstate commerce, or caused them to be so transported;
>
> Second, that the securities described in the Indictment were falsely made, forged, altered, or counterfeited at the time the defendant transported them;
>
> Third, the defendant knew the securities described in the Indictment were falsely made, forged, altered, or counterfeited at the time defendant transported them; and
>
> Fourth, the defendant acted with unlawful or fraudulent intent.

(Rec. 24, Court's Instruction No. 27).

In the prior decision denying the motion for judgment of acquittal, this Court thoroughly analyzed the evidence and in some detail described the discrepancies between defendant's testimony and that of other witnesses. That discussion is incorporated herein by reference. For

present purpose, the Court notes the following from the trial record:

> Defendant testified that he had not altered vehicle titles in Fort Wayne yet Charles Bellavia testified that defendant did so by scraping off the mileage reading and writing on the back of the title. Similarly he testified that he had not altered a title document in Indianapolis but Joseph Sosani testified that he did.
>
> Defendant testified that he did not ask what mileage to put on a vehicle title but Colleen Gunn testified that he specifically asked dealers what mileage should be placed on the title.
>
> Defendant testified that he never asked Steve Minnick to roll back odometers but Robin Younger testified that on more than one occasion she heard defendant ask Minnick to lower the mileage on an odometer.
>
> Defendant testified that he did not discuss with Frank Loftus the fact that they could get into trouble for what they were doing but Loftus said that they had such a discussion.

While some or all of the foregoing may relate to matters contained in counts for which he was not convicted, it is clear that they were also material to the counts of conviction since, among other things, the government was required to prove that the defendant knew the documents were falsely made, forged, altered, or counterfeited and, more importantly, that defendant acted with unlawful or fraudulent intent.

Given the amount of evidence in the record and given that defendant contacted witness after witness on material issues, it can hardly be said that his was inaccurate

testimony caused by confusion, mistake or faulty memory. Rather, it is clear that is was a willful attempt to exonerate himself of all conduct including that for which he was convicted. The factors supporting a sentencing enhancement are established in this record and this Court has no choice but to add two point for obstruction of justice since "the enhancement is mandated where the defendant has engaged in qualifying conduct." *United States v. Zaragoza*, 123 F.3d 472, 485 (7th Cir. 1997).

III. Downward Departure

Defendant has moved for a downward departure. He asserts that there are three basis for a departure in this case: that he was convicted of only 6 of 21 counts and that to allow consideration of the acquitted conduct would be to allow the "tail to wag the dog" of the substantive offense and would overstate the amount of loss; that defendant was not the sole cause of the loss but was a minor participant in the scheme; and that his family and community status takes this case outside the heartland.

The introduction to the Guidelines requires "the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where the conduct significantly differs from the norm the court may consider whether a departure is warranted." In that case a district court may depart from the applicable Guideline range if "the court finds that there exists an aggravating or mitigating circumstance of the kind not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b).

In *Koon v. United States*, 116 S.Ct. 2035 (1996) the United States Supreme Court, after reviewing the foregoing,

indicated that a sentencing court in considering a departure should answer the following questions:

> "1) What features of this case, potentially, take it outside the Guidelines 'heartland' and make of it a special, or unusual case?
>
> "2) Has the Commission forbidden departures based on those features?
>
> "3) If not, has the Commission encouraged departure based on those features?
>
> "4) If not, has the Commission discouraged departures based on those features?"

Id. at 2045 (quoting, *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993). The Supreme Court went onto hold:

> If the special factor is a forbidden factor, the sentencing court cannot use it as a basis of departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. If a factor is unmentioned in the Guidelines, the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole' decide whether it is sufficient to take the case out of the Guideline's heartland. The court must bear in mind that the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'

Id. (internal citations omitted).[13]/ "[A] departure is permissible, even on the basis of a factor disfavored (but not actually prohibited) by the Sentencing Commission, if the defendant is able to show in his particular case the presence of the factor made his case an extraordinary one." *United States v. Pullen*, 89 F.3d 368, 372 (7th Cir., 1996).

Generally, where an accused has been convicted on some charges but acquitted on others, a court is not prevented from considering as relevant conduct for sentencing purposes acts which underlay the charges for which defendant was acquitted. *United States v. Waits*, 117 S.Ct. 633 (1997). The present case is not, as defendant would have it, one in which the sentencing dog is wagging the tail of the substantive offense.

Even if this Court were only to consider the six vehicles in the offense of conviction, the basis offense level of 6 would rise to 10[14]/ and, considering no other enhancements or reductions would require, for a person with a Criminal History Category of I a guideline range of 6-12 months. Under this Court's inclusion of relevant conduct

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[13] / Under the guidelines, "encouraged factors' are those "the Commission has not been able to take into account My in formulating the guidelines." §5K2.0. 'Discouraged factors" are those "not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range and would include such things as the defendant's family ties and responsibilities, §5HI.6, a defendant's education or vocational skills, § 5HI.2, and his or her military, civic, charitable or public service record. §5Hl. 11. "Forbidden factors" include such things as a defendants, race sex national origin, creed, religion and socio-economic status. §5HI.I0.

[14] / Six vehicles at a loss of $3,700 would result in an amount of loss of $22,200 which under the table for 2F1.1 requires that 4 points be added to the base offense of 6.

the same sort of calculation for an offense level of 14 would result in a guideline range of 15-21 months.

Downward departures related to acquitted conduct are appropriate where the sentencing increases have been extraordinarily large and dramatic. Indeed, in the cases relied upon by the defendant the increases were much more substantial than that here: in *United States v. Lombard*, 72 F.3d 170 (1st Cir. 1995) the increase was from a range of 262-327 to a mandatory life sentence; in *United States v Concepcion*, 983 F.2d 369, 386 (2nd Cir. 1996) the increase was from an imprisonment range of 24-30 months to a range of 262-327 months. Just recently, the Seventh Circuit held that "[a]n increase from level 39 to level 43 is not the type of dramatic increase which would allow the sentencing enhancement to become the tail which wags the dog of the substantive offense." *United States v. Meyer*, 157 F.3d 1067, 1082 (7th Cir. 1998). Neither is the 4 level increase here so drastic as to warrant a downward departure.

This Court also concludes that a downward departure is not warranted based upon defendant's argument that he was not the sole cause of the loss and that he was a minor player in the whole scheme of things. While the pre-1991 guidelines provided that downward departures may be considered where the defendant's misrepresentation was "not the sole cause of the loss," that language was written out of subsequent versions of the guidelines including that applicable here. Simply put, this is not one of the "few instances" where "the loss determined under subsection (b)(1) ... overstate[s] the seriousness of the offense" which would allow for a departure, USSG § 2F1.1, Application Note 10.

There remains the question of departure based upon defendant's family and community ties and cicumstances. According to the testimony during the sentencing hearing, defendant is quite active in his two son's lives. He along with his wife are the primary caretakers of the children who

are home schooled by the parents. Defendant acts as the children's athletic coach as well. Quite apart from his family, defendant is the owner and co-operator of Harlan Motors, a business which employs approximately ten full-time and two part-time people. These factors, in the Court's view are not so extraordinary as to warrant a departure.

What constitutes the difference between an extraordinary factor as opposed to an ordinary factor is not susceptible to precise determination. At best it may be described as a nuanced determination. Indeed, a review of even a smattering of cases from federal courts of appeals show just how vagarious the demarcation line between "extraordinary" and "ordinary" in the context of family responsibilities under the guidelines can be. Perhaps it is not even a line but rather "Talmudic distinctions between ordinary and extraordinary suffering....." *United States v. Dyre, 91* F.3d 1462, 1475 (Wald, J. dissenting).

In her dissenting opinion from the denial of rehearing *in banc* in Dyce, Circuit Judge Wald overviewed several cases which presented somewhat analogous facts regarding departures under §5H1.6:

> The culmination of our sister circuits provides only suggestions, not a great deal of firm guidance ... Several circuits have refused to sanction departures simply because incarceration will jeopardize the parental ties of a young child, where a relative is available to care for the children during the parent's incarceration. *See, e.g. United States v. Carr,*932 F.2d 67, 72 (1st Cir. 1991)(no departure for co-defendant parents with 4-year-old son; grandmother will care for child); *United States v. Pozzy,* 902 F.2d 133, 139 (1st Cir. 1990)(no departure for pregnant defendant whose sister has offered to care for child); *United States v. Brand,* 907 F.2d 31, 32-33 (4th Cir.

1990)(no departure even though defendant is sole custodial parent of two young children; defendant's foster parents and mother-in-law will care for children during incarceration); *United States v. Brown*, 29 F.3d 953, 961 (5th Cir. 1994)(no departure for defendant with two children under age five who are being cared for by great-grandmother). But other circuits have affirmed departures in circumstances markedly less compelling than this defendant's. The First Circuit-though denying departures in several earlier cases cited by the panel involving dependent minor children--did permit a departure based on a showing of a strong relationship between a defendant and his lover's son even though the child's mother had custody of her son. *See United States v. Sclamo*, 997 F.2d 970 (1st Cir. 1993). In other cases, departures have been authorized on the grounds that the defendant has several young children, in many cases without discussion of whether other relatives can or will care for the children. *See, eg. Rivera*, 994 F.2d at 952-54 (three children under *six); United States v. Johnson*, 964 F.2d 124, 128-30 (2d Cir.1992)(departure affirmed for defendant who provided sole support for three young children and infant); *United States v. Alba*, 933 F.2d 1117, 1122 (2nd Cir. 1991)(two children, living with disabled, dependent father and grandmother, no indication that defendant's spouse cannot fulfill family responsibilities); *United States v Deigert*, 916 F.2d 916, 918-19 (4th Cir. 1990)(departure authorized on grounds that, *inter alia*, defendant was mother of several children and pregnant with another); *United*

> *States v. Pena*, 930 F.2d 1486, 1494-95 (10th Cir. 1991)(single parent of infant and sole support of 16-year-old daughter and her infant). One circuit left open the possibility that a departure would be permissible based solely on defendant's role as a 'good father' to 'three exemplary children.' *United States v. Canoy*, 38 F.3d 893, 907-08 (7th Cir. 1994). Another circuit affirmed departures in two cases based on the 'unusual mitigating circumstances of life on an Indian reservation.' *United States v. One Star*, 9~F.3d 60, 61 (8th Cir. 1993); *United States v. Big Crow*, 898 F.2d 1326, 1330-32 (8th Cir. 1990). Departure has also been authorized based on a father's anguish at involving his son in a criminal enterprise, absent any showing that his incarceration would cause the family unit to disintegrate. United *States v. Monaco*, 23 F.3d 793, 800-02 (3d Cir. 1994).

Id. supra at 1476-77. Such "precedent is admittedly conflicting, perhaps because the task assigned by the Guidelines is so frustrating and counterintuitive-that is, where on the spectrum we should draw the line between unusual and extraordinary' family tragedies?" *Id.* While the issue is murky and "[t]he line between the usual and unusual is admittedly a fine one," *Canoy, supra* at 907, this Court is nevertheless of the view that whatever the precise cut-off, present defendant's situation, *viz* his family responsibilities and circumstances, unfortunately for him does not fall into the realm of the extraordinary. In fact, unlike many cases where departures have been denied based upon family circumstances and ties, in this case defendant's wife is also an active and supportive parent in regard to the children.

Nor does the fact that his business, Harlan Motors, may be impacted change this Court's conclusion that a

downward departure is not warranted because this is not a case outside the heartland. In the first place, it is not altogether clear that the dire projection that Harlan Motors will close upon defendant's incarceration will come to pass. During the sentencing hearing, his wife testified that she too worked in the business but that she would not have the desire or ability to have it continue should her husband be imprisoned. She admitted during the hearing that the thing that she does not do that her husband does at the company is go to auctions and bid on cars but further testified that that job could be done by someone else. Given the state of the record, it is not clear that Harlan Motors would necessarily cease to exist if defendant were not around.

In its brief, the government asserts that "the law is clear that the alleged social harm caused by the threat of a possible business failure is insufficient for departure." (rec. 63, p. 14). It cites as it primary authority for that proposition *United States v. Rutana*, 932 F.2d 1155, 1158 (6th Cir. 1991) wherein the Sixth Circuit wrote:

> [E]ven assuming that (the defendant's] imprisonment would lead to the failure of his business and the loss of his employees' jobs, this fact does not distinguish [the defendant] from other similar offender. [T]here must be some something 'special' about a given offender, or the accouterments of the crime committed, which distinguishes the case from the mine-run for that offense.... The very nature of the crime dictates that many defendants will likely by employers, whose imprisonment may potentially impose hardship upon their employees and families. (internal quotations omitted).

The law, however, does not appear to be as "clear" as the government would have it. Compare, *United States v. Olbres*, 99 F.3d 28, 34 (1st Cir. 1996)(there is no categorical

prohibition against downward departure based upon prospect that business would close); *United States v. Milikowsky*, 65 F.3d 4, 9 (2nd Cir. 1995)(while business ownership alone does not make downward departure appropriate, court is required to consider possibility of departure 'when there are compelling considerations which take the case out of the heartland factors upon which the Guidelines rest); with *United States v. Sharapan*, 13 F.3d 781, 784-85 (3d Cir. 1994)(holding that district court's departure based upon possible business failure was inconsistent with guideline which provides that departures based on a defendant's "vocational skills"); *Rutana, supra.* Nevertheless, departures based upon potential business failures will only occur in the extraordinary case:

> ... It is a rare case which does fall outside [the heartland]. As courts have recognized, incarceration of a defendant inevitably means that the defendant will no longer be employed by his previous position and that fact inevitably will have consequences.... The mere fact that others will themselves be disadvantaged by the defendants' imprisonment is not alone enough to take a case out of the heartland. These issues are matters of degree, involving qualitative and quantitative judgments.

Olbres, supra 99F.3d at 36. In this Court's considered judgment there is nothing here which takes this case outside of the heartland as it relates to the potential closing of defendant's business,

In sum, this Court has considered the grounds advanced by defendant for a downward departure. It has considered those ground both individually and collectively and finds nothing to warrant a departure from the guideline range. Accordingly, the motion for downward departure will be denied.

Conclusion

On the basis of the foregoing, the Court finds the amount of loss in this case to be between $132,000 and $144,000 requiring that 7 levels be added to the base offense level of 6 under USSG § 2F 1.1. As originally set out in the Presentence Report, an additional 2 points must be added for more than minimal planning under USSG § 2F1.1 (b)(2)and 3 points under USSG § 3 B1.1 (b) as an adjustment for defendant's leadership role. Finally, 2 points will be added for obstruction of justice under USSG 3C 1. 1. The total offense level is therefore 20 and, with a Criminal History Category of 1, defendant faces a guideline sentencing range of 33-41 months. Defendant's motion for a downward departure is denied.

SO ORDERED this 23day of March 1999.

s/William C. Lee
William C. Lee, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

FILED
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STEPHEN R. LUDWIG, CLERK
U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Cause No. 1:97-CR-6
ADAM JADERANY, Defendant.	)	

MEMORANDUM OF DECISION AND ORDER

On April 27, 1999, the defendant Adam Jaderany was sentenced by this Court to a term of 33 months which, in the Court's calculation, was the low end of the guideline range. Shortly before the date set for sentencing, defendant filed a "Motion for Release Pending Appeal." During the course of the sentencing, this Court indicated that it would grant that request being of the view that the statutory requirements for release pending appeal under 18 U.S.C. § 3143 (b) had been met in this case.[1]/ The Court further indicated that it would

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[1] / That statute lists five requirements. There is no suggestion that the defendant is likely to flee, that he is a danger to another person or to the community, or that the appeal is taken for the purpose of delay. The only arguable questions are whether the appeal raises a

issue an Order explaining the reasons for that conclusion particularly as they related to the issue of a downward departure.

Since the defendant's conviction in this Court, the Court has issued several decisions, all of which are incorporated herein by reference. Most recently this Court on March 23, 1999, issued a Memorandum of Decision and Order which, among other things, denied defendant's request for a downward departure.

In denying the defendant's request for a downward departure, this Court took into account the arguments that defendant had been convicted of only 6 of 21 counts, that he was but a minor player in the odometer tampering scheme, and that his family ties and community status take this case outside the heartland. Notwithstanding the factors which weighed in the defendant's favor (i.e. his family ties, community status, and employment), this Court's reading of the body of case law which has developed on the whole issue of departures for family ties and responsibilities led it to conclude that defendant's situation was not unlike that faced by many defendants and was not such as to take it out of the heartland of the cases. Thus, while the Court was aware that it had the *authority* to depart and while the Court recognized that the Supreme Court in *Koon v. United States,* 116 S. Ct. 2035, 2046 (7th Cir. 1997) had indicated that a district court's decision on whether to depart from the guidelines is "due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court," this

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substantial question of law or fact and that a favorable ruling will likely result in a reversal, order for new trial, or a reduced sentence. It would appear that defendant intends to present a host of arguments on appeal. This Court's conclusion relating to the request for release on appeal was limited to the issue of downward departure. A favorable ruling on defendants' behalf in that regard would most assuredly result in a reduced sentence.

Court did not believe that the circumstances in this case when viewed in light of the prevailing case law on the issues in question were such that a downward departure was within the scope of its discretion.

This Court's concern about its ability to depart in cases such as this has been increased by the decision of the Seventh Circuit in *United States v. Carter*, 122 F.3d 469 (7th Cir. 1997), a case in which this Court denied a downward departure under facts somewhat analogous to those here. In doing so, this Court wrestled with the issue of departure but concluded that there, as here, the facts presented for departure were not so extraordinary as to allow for departure, again, when compared to the prevailing case law. On appeal, that decision was affirmed, although a fair reading of the opinion suggests to this Court that if it had chosen to depart, that too may have been appropriate. Some explanation is necessary.

In *Carter*, defendant presented as grounds for departure, his family ties and responsibilities, and his employment (among other things). This Court was impressed with defendant's argument for departure and indeed pointed out that Carter's employment (which constituted work at a day care center) was "laudable." Nevertheless, this Court felt compelled to conclude that based on the case law, a downward departure was not warranted.

On appeal, the Seventh Circuit ultimately agreed with this Court's conclusion or, more accurately, failed to find that this Court had abused its discretion. As for defendant's family ties, after noting several cases which had denied downward departure, the Seventh Circuit wrote that "Carter's family circumstances, when compared to the foregoing cases, do not remove him from the heartland." 122 F.3d at 474. With respect to defendant's employment, the Seventh Circuit wrote that "[h]ere, of course, the nature of the employment was strikingly meritorious" but that "the

district court's decision not to depart, since based on the correct standards, is not reviewable." Id. at 475. The Seventh Circuit concluded its opinion by writing:

> This is a difficult case because we cannot gainsay the defendant's virtues and the sympathetic considerations that he presents. But, as our discussion indicates, they do not require of the district court a different exercise of discretion. We conclude that the district court understood the parameters of its discretion and made its decision within them. We therefore cannot review the decision nor disturb the sentence. Cater's sentence is AFFIRMED.
>
> *Id.* at 477.

This Court too found the *Carter* case difficult and noted that it was "a troubling case." This Court was of the opinion, however, that it had no choice, under the cases which had previously been decided on the issues, but to refuse the request for a downward departure. Indeed, this Court spent a great deal of time struggling with the issue and if the Court thought that a downward departure had been allowable under the case law interpreting the guidelines, it would have granted the same.

Once again, this Court is presented with a situation in which it believes that the sentence called for under the guidelines is too harsh and that defendant has presented a most sympathetic case for downward departure based on family ties and responsibilities. Letters which have been sent to the Court on his behalf speak highly of his virtues.

The undersigned has had experience in applying the guidelines since their inception. Prior to *Koon*, it appeared clear that in order for a judge to exercise his *authority* to depart for a discouraged factor (e.g. family ties or community responsibilities), it was necessary to determine whether the facts presented fell outside the "heartland" and

that was done by simply comparing the facts presented in the case at hand with facts which had appeared in similar cases. If the facts presented in the case before the Court were analogous to those presented in other cases where downward departures were denied, the judge did not have the discretion to grant a departure.

Clearly *Koon* solidified the notion that the trial judge has a good deal of discretion in determining whether the case before the court falls within the "heartland." What the appellate court's decision in *Carter* suggests to this court is that there may even be more discretion afforded the trial court post-*Koon* and that perhaps the Court's discretion extends to allowing a departure if it appears to the Court that the facts before it are outside the heartland even though prior cases would suggest they were not. [2]/ That is, where the case is close, the Court can exercise its discretion and grant a departure even though other judges based upon analogous facts determined that a departure was not warranted under the guidelines.

It is precisely this dilemma which the Court has faced in this case. A strict reading of other cases (which were discussed in the Court's March 23, 1999 Order) suggests to this Court that the facts defendant presents relating to his family ties and community responsibilities do not fall outside the heartland, at least as those cases have delineated the parameters of the heartland. However, if in fact this Court truly has discretion to determine whether defendant's

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[2] This Court's position may well be shared by Circuit Judge Evans who has written: [Koon], in my view greatly alters the landscape of appellate review of departures under the guidelines. Koon tells appellate courts to dump their de novo review of departure and adopt, instead, a deferential 'abuse of discretion' standard. In my view, this monumental change alone casts a pall over all our earlier departure jurisprudence. United States v. Horton, 98 F.3d 313, 321 (7th Cir. 1996)(Evans, J. dissenting).

situation is outside the heartland, that is his circumstances are, to use the terms of the Guidelines, "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commision in formulating the guidelines [and] should result in a sentence different from that described," this Court would, without hesitation, conclude that this is such a situation and that a departure is warranted.

While this Court recognizes that its proper exercise of discretion is not generally reviewable an appeal, the Court questions what the boundaries of its discretion are in this case. It is hoped that guidance will be suggested by the appellate court on appeal. Defendant's "Motion for Release Pending Appeal" of April 23. 1999, is granted as previously indicated in ties Court's Oral ruling of April 27, 1997.

SO ORDERED this 30 day of April 1999.

s/William C. Lee
William C. Lee, Chief Judge
United States District Court

In the
United States Court of Appeals
for the Seventh Circuit

No. 99-2059

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ADAM JADERANY, a/k/a AHMAD JADERANIPOOR,
a/k/a A.J. JADERANY, a/k/a AHMAD JADERANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, Fort Wayne Division.
No. 97 CR 6-**William C Lee,** *Chief Judge.*

ARGUED NOVEMBER 8, 1999-DECIDED JULY 21, 2000

Before POSNER, *Chief Judge,* and RIPPLE and DIANE P. WOOD, *Circuit Judges.*

RIPPLE, *Circuit judge.* Adam Jaderany, a used car salesperson in Fort Wayne, Indiana, was indicted for his participation in a scheme to defraud used car buyers. The scheme involved purchasing used cars at auction, rolling back their odometers, altering their titles, and then reselling them. At trial, the Government provided testimony that Mr. Jaderany was involved personally in altering both the odometers and the titles of used cars, and the jury convicted him on six counts of transporting stolen goods and securities across state lines. After his motion for acquittal was denied, Mr. Jaderany asked the district court to grant him a downward departure in sentencing based on his family circumstances and his community involvement as a successful businessman. The district court denied the request for the departure.

On appeal, Mr. Jaderany submits that the evidence was insufficient to support his conviction and that the district court made a mistake of law when it refused to grant him a downward departure. We hold that there was sufficient evidence to support a conviction and that the district court properly analyzed the question of whether it should grant a downward departure. We therefore affirm the judgment of the district court.

I

BACKGROUND

Because this is an appeal from a conviction, we must construe the facts in the light most favorable to the Government. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Asher*, 178 F.3d 486, 488 n.6 (7th Cir. 1999); *United States v. Wingate*, 128 F.3d 1157, 1158 (7th Cir. 1997). The Government prosecuted Adam Jaderany for his involvement in a scheme to purchase used cars at auction, roll back the odometers, and then re-sell them. He was convicted under 18 U.S.C. § 2314 (transporting forged securities) and 2 (aiding and abetting). We summarize briefly the relevant facts.

The scheme to defraud used car buyers originated with several auto dealers in Illinois. The dealers obtained vehicles at auto auctions. After a car was purchased at auction, its odometer was rolled back in order to increase the resale value of the car. The title was then altered to reflect the new lower mileage.

When Illinois stopped processing titles submitted by several of the dealers, they turned to Mr. Jaderany, who obtained false Indiana titles for them. The false titles had the names of people chosen randomly out of the phone book. Mr. Jaderany provided forged power of attorney documents to his employees, allowing them to obtain title in the names of the unaware, randomly selected people. According to witnesses, Mr. Jaderany was involved personally in both tampering with odometers and altering titles. There was also evidence that documents relating to the vehicles were transported across state lines.

Mr. Jaderany was indicted on 21 counts relating to the alleged fraud. The jury convicted him on six of those counts, relating to the fraudulent resale of six vehicles. Mr. Jaderany moved for acquittal, arguing that the evidence was insufficient to support the conviction. The district court denied that motion. The district court also refused to grant Mr. Jaderany's request for a downward departure based on his family ties and community status. Mr. Jaderany provided extensive evidence that he had important responsibilities to his wife and children and that he was a well-regarded businessman in the community. The district court found that his evidence did not indicate unusual circumstances that would take him outside the "heartland" of family and employment circumstances cases and that, therefore, a departure was unwarranted.

II

DISCUSSION

A. The Sufficiency of the Evidence

1.

A defendant seeking to overturn a conviction based on the insufficiency of the evidence faces a "heavy burden." *United States v. Granados*, 142 F.3d 1016, 1019 (7th Cir. 1998); *United States v. Agostino*, 132 F.3d 1183, 1192 (7th Cir. 1997). We must view all of the facts in the record in the light most favorable to the Government. *See Jackson*, 443 U.S. at 319; *United States v. Curry*, 187 F.3d 762, 769 (7th Cir. 1999). Drawing all reasonable inferences favorable to the Government, we must determine whether it has proved the elements of the crime beyond a reasonable doubt. *See United States v. Hill*, 187 F.3d 698, 700 (7th Cir. 1999); *United States v. Masten*, 170 F.3d 790, 794 (7th Cir. 1999). Reversal is appropriate only if there is truly no evidence from which the jury reasonably could have convicted the defendant. *See Masten*, 170 F.3d at 794; *Granados*, 142 F.3d at 1019.

Mr. Jaderany was convicted of violating 18 U.S.C. § 2314, which governs the transportation of stolen goods and securities across state lines. The district court instructed the jury that to convict Mr. Jaderany, the Government was required to prove four elements of the crime: (1) that the defendant transported securities in interstate commerce, or caused them to be transported; (2) that the securities were forged or altered at the time the defendant transported them; (3) that the defendant knew the securities were forged or altered at the time the defendant transported them; and (4) that the defendant acted with unlawful or fraudulent intent. This instruction was a proper statement of the law. *See United States v. Yusufu*, 63 F.3d 505, 509-10 (7th Cir. 1995); *accord United States v. Drew*, 722 F.2d 551, 553 & n.1 (9th Cir. 1983) (using a slightly different formulation of the same elements); *United States v. Johnson*, 718 F.2d 1317, 1323 (5th

Cir. 1983) (en banc) (same); *United States v. Brown*, 605 F.2d 389, 393 (8th Cir. 1979) (same).[1]

2.

Mr. Jaderany's argument is based primarily on a perceived analogy between his case and the case of James Rekrut in *United States v. Martin*, 815 F.2d 818 (lst Cir. 1987). In *Martin*, co-defendant Rekrut showed that the evidence was insufficient to convict him. *See id.* at 824-27. In that case, Rekrut was a salesman for a car dealer who was found to be perpetrating a fraud on consumers. Rekrut argued that there was no evidence showing that he should have known that he was part of a fraudulent scheme. The Government entered no expert testimony demonstrating that actions taken by Rekrut were inconsistent with normal business practices in the used car industry. *See id.* at 826. The First Circuit held that Rekrut's conviction could not stand, because the Government had not foreclosed the possibility that a person in Rekrut's position would think he was working for a legitimate business. *See id.* at 826-27. Mr. Jaderany argues that, as in that case, the Government has not provided

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[1] The counts of which Mr. Jaderany was found guilty (Counts 16-21) also charged him as an aider and abettor. *See* 18 U.S.C.§ 2. In order to convict Mr. Jaderany as an aider and abettor, the Government had to prove three things: (1) that he knew of the illegal activity; (2) that he desired to help that activity succeed; and (3) that he took some action to help the scheme succeed. See *United States v. Irwin*, 149 F.3d 565, 569-70 (7th Cir. 1998); *United States v. Woods*, 148 F.3d 843, 849-50 (7th Cir. 1998). We have held that "[a]n aider and abettor may be punished with the same severity as a principal." *United States v. Coleman*, 179 F.3d 1056, 1061 (7th Cir. 1999) (quoting *United States v. Corral-Ibarra*, 25 F.3d 430, 436 (7th Cir. 1994)). Mr. Jaderany's brief on appeal casts his argument only in terms of the substantive offense under 18 U.S.C. § 2314. Yet, it should be noted, his specific contention -- that he acted without knowledge and intent -- is relevant to the aiding and abetting charge as well.

evidence of what constituted normal business procedures in the sale of used cars, to compare with Mr. Jaderany's conduct. He also argues that the Government had the obligation to provide such testimony in order to prove that Mr. Jaderany acted with knowledge or intent. Finally, he notes that he was acquitted on most of the counts which, he argues, supports an argument of insufficient evidence.

The Government responds that the evidence missing in Martin - evidence showing that the defendant was "aware of the fraudulent nature" of the documents - is present here. *Martin*, 815 F.2d at 825. Several witnesses testified at Mr. Jaderany's trial that he had personal knowledge of fraud. Charles Bellavia, an automobile purchasing agent, testified that he personally saw Mr. Jaderany alter a vehicle title and that he was with Mr. Jaderany when they both witnessed a vehicle's odometer being rolled back. Colleen Dunn, an insurance agent and former car salesperson, testified that she spoke to Mr. Jaderany personally and that he obtained new and fraudulent titles for her in exchange for a fee. She also testified that Mr. Jaderany said he would choose names out of the. phone book to use on titles. Joseph Sosani, who was convicted for his involvement in the odometer rollbacks, testified that, on one occasion, Mr. Jaderany was present when a title was altered to reflect lower mileage. Robin Lee Younger, the bookkeeper for an automotive repair shop, testified that Mr. Jaderany offered money to have the odometers rolled back on automobiles even though a mechanic told him it was illegal. Frank Loftus, a former employee of Mr. Jaderany's, testified that he saw Mr. Jaderany forge titles.

The Government submits that all of this evidence is sufficient to show that Mr. Jaderany knew the essential purpose of the scheme and intended to further it. Distinguishing *Martin*, the Government points out that in that case Rekrut was a low-ranking employee in the scheme handling documents that appeared valid on their face. Here,

it argues, Mr. Jaderany was shown to have personally involved himself in altering titles and thus demonstrated a knowledge that Rekrut lacked. Furthermore, it contends, expert testimony is unnecessary to show that Mr. Jaderany's practices were not accepted in the industry. The Government also notes that, although Mr. Jaderany was acquitted on many of the counts, such acquittals do not require acquittal on the six counts of which he was convicted. *See United States v. Powell*, 469 U.S. 57 (1984).

3.

Our task here is to consider only whether the Government provided sufficient evidence to permit a reasonable jury to find that Mr. Jaderany acted with knowledge and intent. We believe that the Government has met that burden. Several witnesses provided testimony about Mr. Jaderany's personal involvement in altering titles and rolling back odometers. This testimony, once found credible by the jury, was sufficient to show that Mr. Jaderany acted with the requisite knowledge and intent. We shall not question the jury's decision on this credibility issue. *See United States v. McGee*, 189 F.3d 626, 630 (7th Cir. 1999) ("As we have made clear, it is not our role, when reviewing the sufficiency of the evidence, to second-guess a jury's credibility determinations."); *United States v. McCaffrey*, 181 F.3d 854, 856 (7th Cir. 1999) ("We will not substitute our own credibility assessment for that of the factfinder. . . ."). Mr. Jaderany's analogy to *Martin* is unavailing because, unlike in that case, the Government has provided evidence from which a reasonable jury could infer that he personally knew the fraudulent nature of his actions.

Our assessment is not undermined by the jury's decision to convict Mr. Jaderany on some counts but not on others. We conduct our sufficiency of the evidence review "independent of the jury's determination that evidence on another count was insufficient." *Powell*, 469 U.S. at 67; *United States v. Iriarte-Ortega*, 113 F.3d 1022, 1024 n.2 (9th Cir. 1997)

(quoting *Powell*); *United States v. Reed*, 875 F.2d 107, 111 (7th Cir. 1989) (same). The counts charged violations of different statutory sections and related to different vehicles, and the jury reasonably could have found that the evidence supported convictions relating to some vehicles but not others.

B. The Downward Departure

Having found that the jury verdict was based on sufficient evidence, we turn to Mr. Jaderany's claim that the district court abused its discretion by not granting him a downward departure based on his family circumstances and employment. We may reverse a district court's decision to refuse a departure when it makes a mistake of law. *See United States v. Corry*, 206 F.3d 748, 750 (7th Cir. 2000); *United States v. Thomas*, 181 F.3d 870, 873 (7th Cir. 1999). However, if the district court had a correct legal understanding of the guideline yet still chose not to depart, we lack jurisdiction to review its decision. *See United States v. Williams*, 202 F.3d 959, 964 (7th Cir. 2000); *United States v. Hegge*, 196 F.3d 772, 774 (7th Cir. 1999). Mr. Jaderany argues that the district court made a mistake of law when it determined that his specific circumstances did not place him outside the boundary of the guideline's heartland. [2] We must determine whether the district court's decision that Mr. Jaderany fell within the heartland of Guidelines cases was a mistake of law or, in contrast, was an exercise of discretion of the type we may not review.

1.

The Supreme Court explained the appropriate standard for appellate review of the district court's decisions

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[2] Mr. Jaderany entered evidence of his important role in supporting his wife and children, and of his role as a leader in his community.

about sentencing departures in *Koon v. United States*, 518 U.S. 81 (1996). In doing so, it adopted the methodology of the Court of Appeals for the First Circuit in *United States v. Rivera*, 994 F.2d 942 (lst Cir. 1993), an opinion written by then Chief Judge Breyer. *Koon*, 518 U.S. at 95. In *Koon, the* Supreme Court explained that each sentencing guideline applies to a "heartland" of cases, which are the "'set of typical cases embodying the conduct that each guideline describes.'" *Id.* at 93 (quoting 1995 U.S.S.G. ch. 1, pt. A, intro. comment. 4(b)). The district court should depart from the Guidelines only if some unusual feature of the case takes it out of the heartland: the conduct at issue differs significantly from the norm even though the guideline linguistically applies. *See id.* at 93-95. There are three kinds of potentially unusual factors: forbidden factors, encouraged factors, and discouraged factors. *See id.* at 95-96. Forbidden factors, such as race or national origin, *see id.* at 93, may never be used. *See id.* at 95-96. An encouraged factor, such as victim provocation, *see id.* at 94, may be used when the applicable guideline has not already taken the circumstance at issue into account. *See id.* at 96. A discouraged factor, or an encouraged factor already accounted for by the applicable guideline, should be used as a basis for departure only "if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." *Id.*

In Koon, the Supreme Court also held that appellate courts should review departure decisions only for an abuse of discretion because, on most issues that might arise in this context, district courts are better suited than appellate courts to decide what kinds of cases fall outside the heartland. *See id.* at 98-99. Nevertheless, an appellate court must reverse if the district court made a mistake of law. Such a mistake of law constitutes an abuse of discretion. *See id.* at 100. A district court makes a mistake of law when it relies on a factor that may not be considered in any case, *see id.*, or

determines that the court has no authority to depart when in fact it does. *See United States v. Farouil*, 124 F.3d 838, 845 (7th Cir. 1997). A district court also makes a mistake of law when it misconstrues the language of a guideline and consequently mischaracterizes the boundaries of the heartland created by the guideline. The Court of Appeals for the First Circuit described this situation most graphically in *Rivera*, the case relied upon so heavily by the Supreme Court in *Koon*. Then Chief Judge Breyer wrote:

> Plenary review is ... appropriate where the appellate court, in deciding whether the allegedly special circumstances are of a "kind" that permits departure, will have to perform the "quintessentially legal function" . . . of interpreting a set of words, those of an individual guideline, in light of their intention or purpose, in order to identify the nature of the guideline's "heartland" (to see if the allegedly special circumstance falls within it).

Rivera, 994 F.2d at 951 (citation omitted). *See also United States v. Talk*, 158 F.3d 1064, 1072 (10th Cir. 1998) (citing *Rivera*). We also recognized this situation in *United States v. Canoy*, 38 F.3d 893 (7th Cir. 1994). After deciding that extraordinary family circumstances could be a basis for departure, we turned to our sister courts of appeals for guidance on how to construe the guideline:

> Because until today, we have interpreted section 5H1.6 to prohibit all departures based on family considerations, we have not had occasion to consider what separates the usual and ordinary family circumstance from the truly exceptional and extraordinary. The other circuits have developed a significant *body of law* on this question, however.

Id. at 907 (emphasis added). In characterizing the boundary between the ordinary and the exceptional as the subject of a

"body of law," we recognized that the inquiry into the boundary of a heartland has a legal dimension that it is our responsibility to address. Since *Koon*, the Fourth and Sixth Circuits have also recognized that discerning the boundary of the heartland involves the development of a case law, the task of the appellate court.[3] This limited but important reliance on appellate decisions helps ensure consistency among the district courts with regard to particular sentencing guidelines. Consistency is, of course, an important purpose of the Guidelines. *See* 28 U.S.C. § 991(b)(1)(B); *United States v. Unthank*, 109 F.3d 1205, 1211 (7th Cir. 1997).

Although appellate case law construing a guideline can shape the contours of its heartland and thereby inform the content of the guideline, *Koon* makes clear that the district courts have responsibility for assessing whether the circumstances of a particular case fall outside the heartland of a guideline. In performing this task, a district court must not only assess the boundary of the heartland but must also determine on which side of that boundary the facts of a particular case fall. While appellate case law construing the guideline will set certain legal limitations on the district court's construction of the guideline, the second step is clearly a factual issue. In this function, the district courts are, the Supreme Court has reminded us in *Koon*, in a better position to compare the facts of one case with those of the many others it has adjudicated. *See Koon*, 581 U.S. at 98. As *Koon* recognized, the district court has "special competence" on the question of a particular case's "ordinariness" or "unusualness." Id. at 99 (quoting Rivera, 994 F.2d at 951).

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[3] *See United States v. DeBeir*, 186 F.3d 561, 573 (4th Cir. 1999) (comparing facts to those "found exceptional in existing case law"); *United States v. Ford*, 184 F.3d 566, 585 (6th Cir. 1999) (describing as an issue of law a district court's conclusion that transactions in gambling proceeds were not per se outside a heartland's boundary).

2.

Section 5H1.6 of the Sentencing Guidelines states that "[f]amily ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S.S.G. §5H1.6. Further, §5H1.5 states that "[e]mployment record is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S.S.G. §5H1.5. Since *Koon* we have had several occasions to review a district court's decision as to whether to depart based on family circumstances or employment. *See United States v. Wright*, Nos. 99-1684, 99-3642 & 99-3767, 2000 WL 900185 (7th Cir. July 7, 2000); *United States v. Stefonek*, 179 F.3d 1030 (7th Cir. 1999); *United States v. Guy*, 174 F.3d 859 (7th Cir. 1999); *United States v. Owens*, 145 F.3d 923 (7th Cir. 1998); *United States v. Carter*, 122 F.3d 469 (7th Cir. 1997).

In our decisions interpreting §5H1.6, we have interpreted the guideline language "not ordinarily relevant" to require a sentencing court to recognize that, when an individual is incarcerated, it is expected that his family life will suffer. *See Wright*, 2000 WL 900185, at *2; *Carter*, 122 F.3d at 473; *Canoy*, 38 F.3d at 907. The Guidelines recognizes that many persons convicted of a criminal offense have family responsibilities, including responsibilities to their children; such responsibilities, standing alone, cannot be considered extraordinary. *See Stefonek*, 179 F.3d at *1038; Carter*, 122 F.3d at 475; *Canoy*, 38 F.3d at 907. We have recognized that a defendant's ability to rely on a supportive spouse or other relatives to look after his children makes his case for a downward departure less compelling. *See Carter*, 122 F.3d at 474. Under §5H1.6, when the defendant is a single parent, the district court, in the exercise of its discretion, must determine whether the particular circumstances warrant a departure. *Compare Canoy*, 38 F.3d at 908 (cataloging decisions from other circuits where downward departures for single parents were affirmed) *with*

Carter, 122 F.3d at 474 (noting decisions from other circuits where departures were rejected for single parents).

We also have noted that §5H1.5 recognizes that, for most defendants, holding a steady job is not extraordinary, but in fact expected. *See Carter*, 122 F.3d at 475. We have cautioned that the Guidelines do not permit district courts to grant "'middle class' sentencing discounts," because "criminals who have the education and training that enables people to make a decent living without resorting to crime are more rather than less culpable than their desperately poor and deprived brethren in crime." *Stefonek*, 179 F.3d at 1038. The fact that a defendant's employment was "strikingly meritorious" does not require district courts to grant downward departures on this basis. *See Carter*, 122 F.3d at 475.

3.

In light of our precedents delineating the boundary of the heartland for family circumstances and employment, we lack jurisdiction to review the district court's decision not to grant a downward departure. The district court correctly recognized that it had the authority to depart based on family and employment circumstances. Although the district court thought that the sentence mandated by the Guidelines was too harsh, and that Mr. Jaderany's family circumstances were deeply sympathetic, it nonetheless concluded that, because Mr. Jaderany's situation was similar to previous situations in which downward departures were denied, a downward departure was unwarranted in this case.

The district court employed the proper methodology. First, the district court took note of the boundary of the heartland, and in doing so was mindful of other cases that have delineated the parameters of the heartland. Then, it considered the particular facts of Mr. Jaderany's case, and decided that they fell within the heartland as defined by those earlier cases. The factors considered by the district

court were Mr. Jaderany's strong family ties, the high regard in which he was held by his community, and his successful business. It then concluded that those factors on their own did not make Mr. Jaderany's case unusual.

We are convinced that the district court correctly understood that it had the authority to depart and correctly perceived the boundaries of the heartland as defined by our earlier cases. Because the district court had a correct understanding of the legal standards for departure, we lack jurisdiction to second-guess the district court's decision not to depart. *See Guy*, 174 F.3d at 861; *Carter*, 122 F.3d at 475.

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit